

1 **MKRTCHYAN LAW**

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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 LIZAMARIE RAYZBERG,

13 Plaintiff,

14 vs.

15 COUNTY OF LOS ANGELES, et al.,

16 Defendants.

17 Case No. 2:23-cv-02585 DMG-JC

18 **PLAINTIFF'S EX PARTE**
APPLICATION TO STRIKE
DEFENDANTS' REPLY OR
PERMIT PLAINTIFF TO FILE A
SUR-REPLY IN OPPOSITION TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT OR
SUMMARY ADJUDICATION

19 **Hearing: 4/19/2024**

20 **Trial: 7/9/2024**

21 Plaintiff LIZAMARIE RAYZBERG files this ex parte application on the
22 following grounds:

- 23 1. Defendants filed a reply in support of their Motion for Summary
24 Judgment impermissibly raising new issues and arguments, previously
not raised in their moving papers;

2. Plaintiff is prejudiced by defendants' actions, and request Court to strike Defendants' reply and/or permit Plaintiff to file a sur-reply;
3. Emergency relief is appropriate because the hearing for the motion is scheduled for April 19, 2024, leaving no time for noticed motion.

NOTICE of this *ex parte* application under Local Rule 7-19 was given to defense counsel, Raymond Fuentes, on April 8, 2024. See Exhibit.

Defendants oppose this application.

DATED: April 9, 2024

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By: _____/s/Narine Mkrtchyan_____

NARINE MKRTCHYAN

Attorney for Plaintiff Lizamarie Rayzberg

MEMORANDUM OF POINTS AND AUTHORITIES

In a characteristic pattern of continuous violation of Local Rules, and relevant statutes, the defendants have filed their reply to Plaintiff's Opposition to Defendants' Motion for Summary Adjudication by raising new arguments based on caselaw they never raised in their moving papers. **See Def Reply, Doc. 54, Sec. II, B. p. 16.**

Notably, for the first time in their papers they have addressed the decision of *Scott v. Harris*, related to video recordings, in arguing that the BWC contradicts Plaintiff's version of facts.

"It is well established in this circuit that `"[t]he general rule is that appellants cannot raise a new issue for the first time in their reply briefs."'" *Northwest Acceptance Corp.*, [841 F.2d at 924](#) (quoting *United States v. Birtle*, [792 F.2d 846, 848](#) (9th Cir. 1986))." *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990) Any issue not timely raised is waived. *Dytch v. Yoon*, No. C 10-02915 MEJ at 5 (N.D. Cal. Mar. 8, 2011)

At no point in time, in their voluminous moving papers, they had either cited or relied on arguments made in *Scott v. Harris*, 550 U.S. 372 (2007). Plaintiff therefore, is prejudiced because she did not find it necessary to address the applicability of this case law to the issues at hand and requests the Court to permit a sur-reply to adequately challenge its applicability to these facts.

First, *Scott v. Harris* is not entirely applicable to this case. Its holding was that when the video of the incident plainly contradicted Plaintiff's version of facts that no jury could have reasonably believed Plaintiff, the Court should have taken the facts as depicted in the video at summary judgment stage. In that case, the entire incident of the high-speed pursuit from beginning to end was captured by dashcam video recording of defendant officer, leaving no room for doubt, any gray area of what actually happened. According to Court, the video plainly contradicted Plaintiff's version of what happened.

1 Here, on the contrary to aggressive and false assertions by defendants in
2 their reply, Plaintiff's version of what happened is supported, not contradicted by
3 the video evidence that does not entirely depict the incident with multiple gaps in-
4 between. Defendants turned on and off their BWC videos and the initial
5 interactions between Plaintiff and Defendant Reynal are not captured on Plaintiff's
6 detention was longer than one hour based on the undisputed record. However, the
7 BWC from defendants captures only parts of its with multiple gaps throughout this
8 period. There are only BWC from Defendants Reynal and Saucedo, not from
9 Martinez and they turned their BWC off on multiple occasions. See **Exhibit 19,**
10 **Summary of BWC Video, Plaintiff's Compendium of Evidence in Opposition.**
11 **Doc. 48** Moreover, aside from defendants' BWC recordings, Plaintiff's version of
12 facts is separately supported by the Montebello PD BWC, attached as **Exhibit 16,**
13 **Plaintiff's Compendium of Evidence.** Plaintiff has disputed assertions made by
14 Defendant Reynal in his self-serving declaration both based on these BWC
15 recordings and his sworn deposition testimony. See **Plaintiff's Disputed**
16 **Statement of Facts.** Plaintiff has in fact relied heavily on the BWC recordings in
17 much detail to support her theory of the case, on the contrary to what the
18 defendants have falsely argued continuously relying on Plaintiff's Complaint (not
19 evidence) and incomplete interrogatory responses prior to the development of
20 discovery and all evidence in the case, at sworn depositions of Plaintiff and
21 defendants and non-parties. Therefore, if the Court were even to rely on *Scott*'s
22 holding, it would simply reject defendants' version of facts as it is entirely
23 contradicted by the video evidence, entitling Plaintiff to a summary adjudication
24 on her Fourth Amendment claim.

21 As the Ninth Circuit summarized the thrust of the *Scott*'s holding in *George*
22 *v. Morris:*

23 Even accepting for the sake of argument, though, that *Scott v.*

24 *Harris* is meant to establish an exception to the rules for interlocutory

1 review, the dissent does not fit within that case's terms either. *It points to*
2 *no videotape, audio recording, or similarly dispositive evidence that*
3 *"blatantly contradict[s]" or "utterly discredit[s]" Carol's side of the*
4 *story.* *Scott*, 550 U.S. at 380, 127 S.Ct. 1769.

5 *George v. Morris*, 736 F.3d 829, 835-36 (9th Cir. 2013) (emphasis added)

6 As the 4th Circuit also summarized the holding of *Scott*:

7 Of course, *Scott* does not abrogate the proper summary judgment analysis,
8 which in qualified immunity cases "usually means adopting . . . the
9 plaintiffs version of the facts." 550 U.S. at 378, 127 S.Ct. 1769.

10 Thus, *Scott* does not hold that courts should reject a plaintiffs account
11 on summary judgment whenever documentary evidence, such as a video,
12 offers *some* support for a governmental officer's version of
13 events. Rather, *Scott* merely holds that when documentary evidence
14 "blatantly contradict[s]" a plaintiffs account "so that no reasonable jury
15 could believe it," a court should not credit the plaintiffs version on summary
16 judgment. *Id.* at 380, 127 S.Ct. 1769. As such, *Scott* simply reinforces the
17 unremarkable principle that "[a]t the summary judgment stage, facts
18 must be viewed in the light most favorable to the nonmoving party" when
19 "there is a `genuine' dispute as to those facts." *Id.* (quoting [Fed.R.Civ.P.](#)
56(c)) (emphasis added).

20 Turning to the video in this case, it does not "clearly" or "blatantly"
21 contradict Witt's ` version of the story." *Id.* at 378, 380, 127 S.Ct. 1769.
22 Rather, it provides little assistance in resolving the parties' disputes as to
23 the facts.

1 *Witt v. West Virginia State Police, Troop 2*, 633 F.3d 272, 276-77 (4th Cir.
2 2011)

3 See also *Ramirez v. Martinez*, 716 F.3d 369, 374 (5th Cir. 2013), holding
4 that contents of video were too uncertain to discount plaintiff's version of events:

5 “When the videotape begins, Martinez and Ramirez are already yelling at
6 each other. A struggle ensues, but it is unclear exactly what or who
7 precipitates and what constitutes that struggle.” *Id.*

8 See also *Ferguson v. McDonough*, 13 F.4th 574 (7th Cir. 2021) (declining to
9 apply the Scott exception where the video was open to interpretation and did not
10 utterly discredit the plaintiff's version of the facts)

11 Defendants' assertions that Plaintiff's version of facts is plainly contradicted
12 by incomplete video evidence with gaps is simply false. In support of their
13 arguments, they willfully **misstate and misquote** parties' statements from BWC
14 recordings, fail to mention Plaintiff's sworn deposition testimony, but rely entirely
15 on the Complaint and Plaintiff's Interrogatory Responses prior to development and
16 finishing of the evidence in the case, that cannot be taken as conclusive evidence
17 against her, as they were supplemented by her deposition testimony and those of
18 defendants and other non-parties.

19 Aside from minor inconsistencies about Plaintiff's statements from
20 Interrogatory responses to deposition testimony as to what transpired, the
21 defendants have not identified any material fact offered by Plaintiff that is plainly
22 contradicted by video evidence. Main issues for Court's review are the reasons for
23 Plaintiff's detention, the length of detention, and the scope and extent of the force
24 used on her, and Plaintiff has identified genuine dispute as to all issues. Plaintiff

1 has disputed the propriety of her initial detention, the length of her detention and
2 the application of force used on her. Furthermore, the scope of her injuries cannot
3 be proven on the face of BWC recordings, because they are invisible injuries. The
4 mechanics of Plaintiff's injury is not plainly visible on the face of the BWC
5 recordings, because the video does not depict the position of Plaintiff's wrists
6 during handcuffing by Reynal. Defendants have not materially disputed by expert
7 testimony that Plaintiff has sustained an injury as a result of both the handcuffing
8 and her seated position in the patrol car. The BWC would not help the Court as to
9 how Plaintiff sustained an injury while seated in the car. A shoulder tear and nerve
10 damage requires **medical evidence**, that Plaintiff has produced through expert
11 declaration in disputing defendants' assertions of fact that no excessive force was
12 applied or that their officers were acting reasonably when kept Plaintiff in
13 handcuffs in a uncomfortable position seated in the patrol car. **Plaintiff's**
Disputed Statement of Facts.

14 Unless the defendants have produced a different set of BWC recordings to
15 Court from what they produced to Plaintiff in discovery, which Plaintiff does not
16 contend, their arguments fail entirely, because the video evidence supports
17 Plaintiff's version in material respect. Because there are also gaps in recordings,
18 there is a genuine issue of material fact, as to what happened during those gaps.
19 Plaintiff has adequately disputed Defendant Reynal's assertions that he was acting
20 as a reasonably prudent officer in his initial interactions with her prior to turning
21 on his BWC, or during the entirety of his investigation, when he turned off his
22 BWC on multiple occasions. As an example, Plaintiff has the benefit of the
23 Montebello BWC recordings as **Exhibit 16**, to dispute Reynal's assertions in
24 material respect. Clearly, he had turned off his BWC during his discussions with

1 Montebello PD officers, Defendants Martinez and Saucedo, or other civilians he
2 spoke during the incident. See **Plaintiff's Disputed Statement of Facts.**

3 For the following reasons, Plaintiff requests the Court to strike Defendants'
4 Reply or permit Plaintiff to file a sur-reply to Defendants' Reply.

5 **Date: April 9, 2024**

MKRTCHYAN LAW

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7 By: _____/s/Narine Mkrtchyan_____

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9 **NARINE MKRTCHYAN**

10 Attorney for Plaintiff Lizamarie Rayzberg

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